Supreme Court, U.S.
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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

IN RE: ELONEX PHASE II POWER MANAGEMENT LITIGATION

JEAN CO., LTD.,
Petitioner,
and
KOREA DATA SYSTEMS CO. LTD, et al.
Defendants,
v.
ELONEX I.P. HOLDINGS, LTD. and EIP LICENSING, B.V.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

I. WHETHER THE TRIAL COURT ERRED IN GRANTING JURISDICTION OVER A TAIWANESE DEFENDANT IN THE ABSENCE OF ANY PURPOSFUL ACTIVITY DIRECTED TOWARD DELAWARE AND IN THE ABSENCE OF ANY GOODS SOLD IN DELAWARE THAT ALLEGEDLY INFRINGED THE PLAINTIFF'S PATENT RIGHTS.

PARTIES TO THE PROCEEDING

IN RE: ELONEX PHASE II POWER

MANAGEMENT LITIGATION

JEAN CO., LTD.
Petitioner,

and

KOREA DATA SYSTEMS CO. LTD, KOREA DATA SYSTEMS AMERICA, INC. TAIWAN VIDEO & MONITOR CORP., TVM VIDEO & MONITOR USA CORP., TVM PERIPHERALS, INC. ENVISION PERIPHERALS, INC. PROVIEW INTERNATIONAL HOLDINGS LTD., PIXIE TECHNOLOGIES, INC., LG ELECTRONICS, INC., KUO FENG CORP., NEC CORP., LITE-ON TECHNOLOGY CORP., ADI CORP., CHUNTEX ELECTRONICS CO., LTD. TATUNG CORP., ACER COMMUNICATIONS & MULTIMEDIA, INC., SMILE INTERNATIONAL, INC., TOP VICTORY ELECTRONICS (TAIWAN) CO., LTD., CTX INTERNATIONAL, NECX DIRECT, LLC, AND AOC INTERNATIONAL,
Defendants,

v.

ELONEX I.P. HOLDINGS, LTD. and EIP LICENSING, B.V.,

Respondents.

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STATEMENT OF JURISDICTION

The final order sought to be reviewed was entered on May 10, 2004. (A-45a) The jurisdiction of this Court is invoked on the basis that a right, privilege or immunity is claimed under the United States Constitution, and the decision in the Court below was against that right, privilege or immunity.

CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the United States Constitution, Section 1 provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case involves the due process provisions of the Fourteenth Amendment of the United States Constitution. The basis for federal jurisdiction in the court of first instance is conferred by 35 U.S.C. § 271. The basis for certiorari is 28 U.S.C. §1254 (1).

STATEMENT OF NECESSARY FACTS

The Petitioner appealed the default judgment entered by the United States District Court of Delaware (herein referred to as "District court") against Jean Co. (herein referred to as "Jean") made on July 8, 2003 (A-9a) on the ground that the district court erred by entering a judgment when jurisdiction was lacking. This decision was affirmed by the U.S. Court of Appeals, Federal Circuit on May 10, 2004. (A-43a)

On February 14, 2001, plaintiffs-respondents Elonex I.P. Holdings, Ltd. and EIP Licensing, B.V. (collectively "Elonex") served a complaint on Jean through the Delaware Secretary of State alleging infringement of United States Patents 5,389,952, 5,648,799 and 5,880,719 (the "patents-in-suit"). A163-69. On June 18, 2001, the district court clerk entered a default against Jean.

Elonex took no further action against Jean until January 31, 2003, when Elonex moved the district court for judgment in its favor in the amount of $24,344,325. On March 10, 2003, the district granted Jean additional time in which to respond to Elonex's motion for default judgment. Jean moved to dismiss Elonex's action against Jean for lack of personal jurisdiction on March 14, 2003. On May 6, 2003, the district court denied Jean's motion to dismiss. (reported

at *in Re: Elonex Phase II Power Mgmt. Lit.*, 2003 U.S. Dist. LEXIS 7715). (A-1a)

On June 17, 2003 Jean opposed Elonex's motion for default judgment. On June 18, 2003, the district court held a hearing on Elonex's request for default judgment. On July 8, 2003, the district court entered judgment in favor of Elonex in the amount of $3,630,762, together with enhanced damages of $3,617,829 and prejudgment interest of $1,479,431.26, for a total of $8,728,022.26.

On August 7, 2003, Jean appealed to the U.S. Court of Appeals for the Federal Circuit (herein referred to as "court of appeals") for review of the July 8, 2003 judgment and also moved the district court for relief from the July 8, 2003 Order under Fed.R.Civ.P.Rule 60(b). On August 28, 2003, the district court denied Jean's Rule 60(b) motion. (reported at *In Re:Elonex Phase II Power Mgmt. Lit.*, 279 F. Supp 2nd 521 (D. Del. 2003)). On September 29, 2003 Jean appealed the August 28, 2003 Order. On October 10, 2003, the court of appeals consolidated these appeals.

On May 10, 2004 the court of appeals affirmed the district court's decision. On June 7, 2004 Judgment Jean filed a Combined Petition for Rehearing and Rehearing En Banc in the court of appeals. (A-43a) The court denied review of the petition on July 2, 2004. (A-45a)

ARGUMENT

The issues presented in this petition must be answered if foreign defendants, like the petitioner Jean Co. Ltd. ("Jean"), are to have any realistic ability to "structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *See World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297 (1980). Courts have found jurisdiction on the stream of commerce theory consistent with the due process fairness requirements for two principal reasons.

First, by increasing the distribution of its products through indirect sales within the forum, the manufacturer benefits from the protection provided by forum state laws and from the profit realized from indirect sales to forum residents. *Nelson ex rel. Carson v. Park Indus., 717 F. 2d 1120, 1125 (7th Cir. 1983); Plant Food Co-op v. Wolfkill Feed & Fertilizer Corp., 633 F 2d 155, 159 (9th Cir 1980; Coulter v. Sears, Roebuck & Co., 426 F 2d 1315, 1320 (5th Cir. 1970)*

Second, courts reason that a state has a strong interest in providing a forum for injured residents and protecting them from personal and economic harm. *Coulter at 1315, 1320.* Here, the allegedly injured plaintiffs are not residents of the forum in which the action was brought and there is no evidence of personal or economic harm within that forum.

Importantly, there is a variation among the various Federal Circuits in the interpretation of this Court's ruling in *Asahi Metal Industry Cp., Ltd. V. Superior Court of California, Solano County Cheng (Cheng Shin Rubber Industrial Co., Ltd. Real Party in Interest) 480 U.S. 102; 107 S. Ct. 1026, 1032 (1987).* This variation of interpretation suggests that further guidance is needed from the Court in

order to accomplish the goal of foreign defendants being able to structure their conduct as set out in *World-Wide Volkswagen*.

It is submitted that the July 8, 2003 default judgment against Jean is void because the district court lacked personal jurisdiction over Jean in the dispute with Elonex. Jean never purposefully directed any activity towards Delaware, and as such, lacked the sufficient minimum contacts with Delaware necessary to support permissible jurisdiction under the Fourteenth Amendment to the U.S. Constitution. The District court's reliance on the stream of commerce theory was misplaced as it found jurisdiction over Jean based solely on Jean's alleged knowledge that monitors it made could wind up in Delaware.

It is further submitted that the district court abused its discretion when it entered a default judgment against Jean and later when it denied Jean's request for relief from the default judgment under Rule 60(b) of the Federal Rules of Civil Procedure.

I. This Court previously required that a Defendant act purposefully toward the Forum for Jurisdiction to attach.

In *Asahi*, this Court affirmed that the "substantial connection" between the defendant and the forum State necessary for a finding a minimum contacts must come about from an action of the defendant purposefully directed toward the forum State. *Asahi* at 107 S. Ct. 1032 (1987) The plurality opinion, written by Justice O'Connor, supported a personal jurisdiction standard in which a defendant meets constitutionally required minimum contacts only when the defendant acts to purposefully direct its activities toward the forum. *Asahi* at 112. ("[A] defendant's awareness that the stream of commerce may or will sweep the product into the

forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.").

The plurality gave examples of the type of additional conduct that could indicate an intent of the defendant to serve the market in the forum such as: (1) designing the product for the market in the forum State, (2) advertising in the forum State, or (4) marketing the product through a distributor who has agreed to serve as the sales agent in the Forum State. *Id.* Consequently, the plurality found that the defendant in *Asahi* was not subject to personal jurisdiction in the forum because it took no additional act other than selling its product to another company that subsequently distributed the products to the forum.

The court of appeals affirmed the district court's decision that Jean was subject to personal jurisdiction in Delaware despite the fact that (1) Jean did not commit any act purposefully directed to Delaware and (2) not a single product manufactured by Jean was found in Delaware. Thus, the court below held that Jean satisfied the constitutionally required minimum contacts with Delaware based solely on Jean's alleged knowledge that its products would eventually enter Delaware once placed in the stream of commerce. This Court held that the "substantial connection" in *Burger King Corp. v. Rudzewicz* between the defendant and the forum State necessary for a finding of minimum contacts must come about by and action of the defendant purposefully directed toward the forum State. *Burger King Corp. v. Rudzewicz.* 471 U.S. 462 (1985).

Indeed, Jean had no "contact" with Delaware except that it made monitors for computer companies that in turn

sold such monitors to retailers that had stores in Delaware.[1] The record, moreover, lacks any evidence that these monitors were ever found in Delaware and, critically, that Jean engaged in any conduct that may have caused such monitors to enter that state. Accordingly, if personal jurisdiction is to be found in this case, it must necessarily have been based upon a permissive stream of commerce theory where placement of goods into the stream of commerce alone is sufficient for jurisdiction. Given the importance of this issue to the many foreign companies that engage in business in the Untied States, this Court ought to affirmatively answer the question left open by the CAFC in *Beverly Hills Fan. Beverly Hills Fan Co. v. Royal Sovereign Corp.* ,21 F. 3d 1558 (Fed. Cir. 1994).

The appeal court's decision conflicts with the personal jurisdiction standard set forth by the plurality opinion of this Court in *Asahi*, the opinions of the First, Fourth and Sixth Circuits, and the District Courts of the District of Columbia and the Tenth Circuit. The entry of judgment in the court below seemingly endorses the exercise of jurisdiction over a foreign defendant in any forum so long as that defendant does business with a U.S. company that does business nationwide. *Cf. Red Wing Shoe Co. v. Hockerson-Halberstadt, Inc.*, 148 F.3d 1355, 1361 (Fed.Cir. 1998) (noting that such a basis for jurisdiction was "flawed").

II. The First, Fourth and Sixth Circuits require a defendant to commit an act purposefully directed to the forum, while others do not.

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[1] Other alleged contacts included a passive web site that offered no products for sale, a corporate entity separate from Jean in New Jersey, and a federal certification program with no association with Delaware. To the extent that the panel hearing this appeal held that these contacts were constitutionally cognizable contacts, this petition hereby asserts that such holding was an error of law.

Using the *Asahi* decision as guidance, the First, Fourth and Sixth Circuits, as well as district courts within the D.C. and Tenth Circuits, have endorsed the stream of commerce theory set out by plurality of this Court in *Asahi*. *Rodriquez v. Fullerton Tires Corp.* 115 F.3d 81, 85 (1st Cir. 1997); *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 945-46 (4th Cir. 1994); *Bridgeport Music Inc. v. Still N the Water Publ'g*, 327 F.3d 472, 480 (6th Cir. 2003); *Manifold v. Wolf Coach, Inc.*, 231 F. Supp 2d 58, 61 (D.D.C. 2002); *Four B Corp. v. Ueno Fine Chem. Indus., Ltd.*, 241 F. Supp 2d 1258, 1265 (D. Kan. 2003).

In *Bridgeport Music*, the Sixth Circuit made clear its choice to apply the plurality's stream of commerce theory. The court held that the defendant was not subject to personal jurisdiction in the forum where its products were eventually sold because the defendant did not place an affirmative obligation upon the distributor to distribute the products in the forum. *Bridgeport Music Inc.*, 327 F.3d 472, 480. The court specifically noted that the defendant's "knowledge that [the distributor] was likely to distribute [the product] nationally, coupled with its lack of objection to [the sales in the forum], if such sales were ever to occur, is insufficient conduct upon which to predicate purposeful availment." *Id.* at 480.

Likewise, in *Lesnick*, the defendant admittedly knew that its products entered the forum. Indeed, the record in *Lesnick* established that the defendant "jointly owned" a patent (covering the products) with the entity that brought the products into the forum. *Lesnick*, 35 F.3d 939 at 946. Recognizing that the joint ownership of the patent was "additional conduct," the Fourth Circuit rejected personal jurisdiction over the defendant because such conduct was not directed toward the forum. *Id.* at 946-47. The court reasoned any other result "would subject defendants to judgments in locations based on the activity of third persons and not the

deliberate conduct of the defendant, making it impossible for defendants to plan and structure their business contacts and risks." *Lesnick.* at 945.

III. Jean did not purposefully direct monitors into Delaware.

With this background of personal Jurisdiction in mind, Jean contended on appeal, which was not seriously contested, that it was not subject to personal jurisdiction in Delaware because it did not purposefully direct its activities to Delaware. Thus, Jean could not be subject to personal jurisdiction in Delaware under the stream of commerce theory presented by the plurality in *Asahi.* As the uncontroverted record established, Jean did not have a distribution network of its own, nor did it control, create or establish a distribution channel, that may have brought monitors into Delaware. To the contrary, the record shows that Jean is a Taiwanese company that manufactures computer monitors on behalf of branded monitor vendors, such as View Sonic and IBM, who outsource the manufacture of their monitors.

Jean delivers the monitors to their customers free-on-board in China and Taiwan. Jean has no distribution channel or marketing strategies outside of China over which it has any control or input. Simply stated, Jean manufactures monitors upon requests by its vendors and places those monitors into the world-wide stream of commerce from Taiwan and China. The vendors then bring the monitors into the Untied States and place them into their own nationwide distribution networks. Unlike the additional conduct required by the plurality in *Asahi*, Jean never committed an act to purposefully direct any monitors into Delaware because it has no control over the placement of the monitors.

IV. There is no evidence of any sale of infringing product in the forum.

As noted above, the record lacks any evidence that allegedly infringing monitors made be Jean were found in Delaware. This was confirmed at the hearing before the CAFC. There, the following dialog took place between the Court and counsel for Elonex:

> CIRCUIT JUDGE NEWMAN: But you never alleged that they were personally doing business in Delaware. As I recall it was that their products made their way to Delaware because of the customers to whom they sold in China.
>
> MR. BLACK: That's correct. The allegation is that their products went through the stream of commerce in Delaware.
>
> CIRCUIT JUDGE NEWMAN: And there is no evidence of any one example?
>
> MR. BLACK: No.[2]

The affirmation by the CAFC of the District Court's ruling, with no evidence of sale of any infringing product within the forum, is inconsistent with other Circuits and this Court's holding in *Asahi*.

V. The Federal Circuit's decision leads to untenable results.

The district court denied Jean's challenge to the court's assertion of personal jurisdiction based primarily on Jean's sale of monitors to vendors who have nationwide and established distribution networks. *In Re: Elonex Phase II*

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[2] Transcript of Hearing of May 4, 2004, A-29a, line 22 to A-30a, line 8.

Power Mgmt. Lit., 2003 U.S. Dist. LEXIS 7715. By affirming the district court's decision that Jean was subject to personal jurisdiction in Delaware, this court of appears necessarily found that Jean had knowledge that the monitors manufactured by Jean entered Delaware. *See Asahi*, 480 U.S. 102, 117. The court of appeals, however, *could not have found* that Jean committed an act to purposefully direct the monitors to Delaware because the undisputed facts show that Jean had no control over the monitors once the vendors received them in China.

The fact that Jean did business with companies that had nationwide distribution networks cannot be an act sufficient to purposefully direct activity to Delaware because it would render the plurality opinion of this Court in *Asahi* meaningless. In *Asahi* the defendant knew that the company to whom it sold its products would distribute and sell defendant's products in the forum. *Id* at 108. According to the plurality, the defendant's act of doing business with that company was not an act sufficient to meet constitutionally required minimum contacts. As in the present case, Jean's involvement with companies having nationwide distribution networks, without more, amounts at most to knowledge that the monitors may enter Delaware. Jean did not commit an act to purposefully direct the monitors to Delaware because Jean had no ability to control the placement of the monitors.

The CAFC's holding in *Beverly Hills Fan Co.* directly illustrates this point. *Beverly Hills Fan Co.* 21 F.3d 1558 (Fed. Cir. 1994). In *Beverly Hills Fan*, the defendant, Ultec, manufactured an allegedly infringing product in Taiwan and sold it through the other defendant, Royal, who imported and distributed the product to the forum state. *Id.* at 1560. The CAFC found that Ultec was subject to the personal jurisdiction in the forum under either theory in *Asahi*. *Id.* at 1566. Thus, Ultec must have had more than mere knowledge that its products entered the forum, and it must have

committed an act to indicate its intent to serve the forum. The CAFC found that beyond mere knowledge, the defendants *formed* the distribution channel and *acted in consort* to bring the devices *into the forum. Beverly Hills Fan Co.* at 1564, 1566. By contrast, in the present case, Jean had no control over the monitors once delivered to its vendors.

VI. The Federal Circuit's decision leads to untenable results.

The lower court's decision in this case brings unfavorable consequences to the jurisprudence of personal jurisdiction because it provides no reasonable mechanism for companies like Jean to plan and structure their businesses. In contrast to the decision of the CAFC below, this Court has consistently adhered to a minimum contacts analysis that requires an out-of-state defendant to have engaged in some activity purposefully directed toward the forum state. *See Burger King Corp.*, 471 U.S. 462, 474; *World-Wide Volkswagon*, 444 U.S. 286, 297. The decision below, however, effectively rejects this rule. It is submitted that this decision will "subject defendants to judgments in locations based on the activity of third persons and not the deliberate conduct of the defendant, making it impossible for defendants to plan and structure their business contacts and risks." *See Lesnick* 35 F.3d 939, 945.

CONCLUSION

A company such as Jean, under the result of this case, could only insulate itself from personal jurisdiction in any specific state by refusing to do business with U.S. entities that have nationwide distribution channels. Indeed, under the district court's and Elonex's theory of personal jurisdiction, Jean was subject to personal jurisdiction in every state of this country. This "solution" is unfeasible and unfair. It ignores

the realities of our global marketplace, and it, in effect, creates nationwide personal jurisdiction based upon national contacts. It is respectfully submitted that this judicial imperialism is inconsistent with the Due Process requirements of the Fourteenth Amendment, and should be reversed.

For the reasons set forth above, the issuance of a Writ of Certiorari is earnestly solicited.

Respectfully submitted,

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APPENDIX

APPENDIX A- MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE DATED AND FILED MAY 6, 2003

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

IN RE: ELONEX PHASE II POWER MANAGEMENT LITIGATION :	C.A. Nos.:01-082 GMS; 01-083 GMS :01-084 GMS; 01-085 GMS; :01-086 GMS; 01-087 GMS; :01-088 GMS; 01-089 GMS; :01-090 GMS; 01-091 GMS; :01-092 GMS; 01-093 GMS; :01-095 GMS; 01-096 GMS; :01-097 GMS; 0 1-098 GMS
Filed:May 6, 2003	:01-099GMS;01-100GMS :01-101 GMS;01-1O2GMS :01-103 GMS; 01-104 GMS

MEMORANDUM AND ORDER

I. INTRODUCTION

On February 13, 2001, the plaintiffs, Elonex I.P. Holdings, Ltd. and EIP Licensing, B.V. (collectively "Elonex"), filed this action against certain companies that manufacture and sell computer systems or computer monitors.[1] The complaint alleges infringement of U.S. Patent Numbers 5,389,952 (" the '952 patent"), 5,648,799 ("the '799 patent"), and 5,649,719 ("the '719 patent"). The

[1] In December 1998, Elonex I.P. Holdings Ltd. and Elonex plc filed a related lawsuit against another group of defendants on substantially the same grounds ("Elonex Phase I litigation").

lawsuit relates to technology that concerns power management in computer monitors.

On May 21, 2001, Elonex requested entry of default against the defendant Jean Co., Ltd. ("Jean"). The Clerk of the Court entered default against Jean on June 18, 2001. On January 31, 2003, Elonex then moved for entry of default judgment against Jean. On February 20, 2002, counsel entered an appearance on behalf of Jean.

Presently before the court is Jean's motion to dismiss for lack of personal jurisdiction. For the following reasons, the court will deny this motion.

II. BACKGROUND

Jean is an international monitor and electronics manufacturer, with its principle place of business in Taipei, Taiwan. In 2001, Jean had more than $316 million in worldwide sales.

From March 1995 until April 1996, Elonex alleges that Jean shipped 404,855 monitors to the United States. Since 1998, ViewSonic Corporation and eMachines, Inc. — two United States monitor companies with nationwide re-seller networks - have been among Jean's biggest customers. According to Jean's 1999 Annual Report, ViewSonic alone accounted for 22.91% of Jean's worldwide monitor sales in 1998. In 1999, ViewSonic purchased 30.4% of Jean's total 1999 monitor sales. In 2001, ViewSonic purchased 39.7% of Jean's total monitor sales. Likewise, in 1999, eMachines purchased 12.94% of Jean's worldwide monitor sales.

Additionally, both ViewSonic and eMachines have well-established retail distribution networks. ViewSonic monitors are available from retailers such as Best Buy, Office Depot, and CompUSA. Likewise, eMachines monitors are sold in Delaware at Best Buy, Office Depot, and Circuit City. Both ViewSonic and eMachines also sell monitors directly to consumers via their own internet websites. Thus, the Jean monitors sold to ViewSonic and eMachines are resold in Delaware and throughout the United States.

Furthermore, Delaware purchasers of Jean monitors can download monitor software and obtain customer service via Jean's website. Visitors to the website can also download drivers for Jean monitors and obtain technical support via e-mail. Finally, Jean's website lists an "East Coast" service facility located in New Jersey.

III. DISCUSSION

A. Due Process

The Due Process Clause requires that, in order to subject a defendant who is "not present within the territory of the forum" to personal jurisdiction, the court must first make sure that the party "ha[s] certain minimum contacts with [the forum] state such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice." *International Shoe* 326 U.S. at 316 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). In order to give non-residents "fair warning" that a particular

activity may subject them to litigation within the forum, these "minimum contacts" must be purposeful. *See Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 472 *(1985).* In other words, the defendant's contacts must be of the nature that would cause it to reasonably foresee that it might be "haled before a court" in the forum as a result of its conduct. *See World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286,297(1980). Finally, "even if the requisite minimum contacts have been found through an application ~f the stream of commerce theory or otherwise, if it would be unreasonable for the forum to assert jurisdiction under all the facts and circumstances, then due process requires thatjurisdiction be denied." *Beverly Hills Fan Co. v. Royal Sovereign Corp.,* 21 F.3d *1558,* 1568 (Fed. Cir. 1994).

In *Beverly Hills Fan,* the Federal Circuit addressed the question of whether Ultec, a People's Republic of China corporation with a manufacturing facility in Taiwan, was subject to personal jurisdiction in Virginia. 21 F.3d at 1560. Ultec claimed that it was not subject to personal jurisdiction in Virginia because it did not have any Virginia assets, employees, or a license to do business in that state. *Id.* Acknowledging that Ultec's sole contact with the forum resulted from indirect shipments through the stream of commerce, the Federal Circuit held that Ultec "purposefully shipped the accused fans into Virginia through an established distribution channel The cause of action for patent infringement is alleged to rise out of these activities. No more is usually required to establish specific jurisdiction." *Id.* at 1560, 1564-65.

The court's decision in *Motorola Inc. v. PC-Tel, Inc.* is likewise instructive in resolving the present issue. 58 F.

Appendix A

Supp. 2d 349 (D. Del. 1999). In that case, the court described the accused infringer's sales activities as follows:

> Altocom does not (and, it seems, cannot) contest the fact that its softmodems are integrated into a variety of consumer electronic products which are manufactured by well-known multi-national corporations like Compaq, Phillips, Samsung, Sharp, Song, and the like. These goods are then put into the world-wide distribution networks which place them for sale in equally well-known retail stores such as Caldor, Circuit City, CompUSA, Office-Max, Sears, Service Merchandise, and others — all of which have outlets in Delaware.

58 F. Supp. 2d at 352. Relying on *Beverly Hills Fan,* the court rejected AltoCom's arguments and held that exercising personal jurisdiction comported with due process. *See id.* at *355-56.*

In the present case, as in *Beverly Hills Fan,* Jean's president states in his declaration that Jean makes no direct sales to the United States. He further states that Jean has no United States offices or subsidiaries. However, the court concludes that Jean has, for many years, been the first link in precisely the kind of indirect distribution chain that the Federal Circuit found sufficient to establish personal jurisdiction. Specifically, Jean sells it monitors to ViewSonic and eMachines, who in turn distribute Jean's monitors to retailers with Delaware operations. Given ViewSonic ' s and eMachines' extensive re-reseller networks in Delaware and on the Internet, Jean cannot credibly claim it had no inkling that some of its monitors would make their way into Delaware via well-established distribution channels.

Appendix A

Jean further maintains an interactive website through which customers in Delaware, and elsewhere, can download driver software, as well as obtain customer support. On its website, it also lists "Global Service Centers," including an "East Coast" service facility in New Jersey. These facts further support the court's conclusion that Jean's undeniably substantial and regular monitor sales into ViewSonic's and eMachines' national distribution networks constitute "purposeful minimum contacts" with Delaware.

Notwithstanding the existence of Jean's purposeful minimum contacts with this forum, the court must consider whether the "minimum requirements inherent in the concept of 'fair play and substantial justice . . .' defeat the reasonableness of [the assertion of] jurisdiction, even [if] the defendant has purposefully engaged in forum activities." *Asahi Metal Indust. Co. v. Superior Court,* 480 U.S. 102, 116 (1987). This question will only be answered affirmatively if the state's and the plaintiff's interest in having the dispute adjudicated in the forum are so minimal as to be outweighed by the burden imposed by subjecting the defendants to litigation within the forum. *See Beverly Hills Fan,* 21 F.3dat 1568.

In the present case, Delaware clearly has a substantial interest in discouraging injuries in the state, including patent infringement injury. It has also been the sole forum for the Elonex Power Management Litigation for several years. Finally, and as the *Beverly Hills Fan* court noted, "progress in communications and transportation" have made "the defense of a lawsuit in a foreign tribunal less burdensome." 21 F.3d at 1569 (internal quotation and citation omitted). Thus, the court concludes that any burden on Jean "is

not sufficiently compelling to outweigh" Elonex's and Delaware's interests. *Id.*

B. Delaware's Long-Arm Statute

The second step in the court's analysis into the propriety of subjecting Jean to personal jurisdiction in this forum is the determination of whether any of the provisions of Delaware's long-arm statute apply. *See* DEL. CODE. ANN. tit. 10 § 3104. While Jean contends that it does not fall within the grasp of any of Section 3104's provisions, Elonex contends that at least two of the provisions apply here. For purposes of this order, the court need only discuss one.

Under subsection (c)(4), the court may exercise personal jurisdiction over anyone who causes injury either inside or outside of this State "by an act or omission outside of the State" if that individual "regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from services or things used or consumed in the State." DEL. CODE. ANN. tit. 10, § 3104(c) (2001).[2] The court will interpret this language broadly, as reaching the "maximum parameters of the due process clause." *See Jeffreys v. Exten,* 784 F. Supp. 146, 151 (D. Del. 1992).

As discussed above in Section III A, Jean has intentionally sold monitors using nationwide distribution

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[2] This subsection provides general jurisdiction over the nonresident defendant. *See Mendelson v. Delaware River and Bay Auth.*, 56 F. Supp. 2d 436, 439 (D. Del. 1999).

Accordingly, it is immaterial whether the jurisdictional contact is related to the claim. *See id.*

channels. This knowing and purposeful shipment of monitors satisfies the act requirement of Section 31 04(c)(4). *See Beverly Hills Fan,* 21 F.3d at 1571. Because Jean undeniably derives substantial revenue from these activities, it is subject to jurisdiction under Delaware's long-arm statute. *See* Chang Decl. at ¶¶1 3-7 (discussing Jean's revenue from sales to ViewSonic and eMachines).

C. Venue

Jean finally asserts that, pursuant to 28 U.S.C. § 139 1(c), venue is improper in this district. Jean's argument is meritless, however, because "[t]he venue issue is subsumed in the personal jurisdiction issue. Venue lies ipso facto if. . . the district court has personal jurisdiction over [the defendant]." *North American Philips Corp. v. American Vending Sales, Inc.,* 35 F.3d 1576, 1577 n. 1 (Fed. Cir. 1994); *see also* 28 U.S.C. § 1391(b)(1) & (c) (stating that venue is proper in ajudicial district where the defendant corporation is subject to personal jurisdiction at the time the action is commenced). As the court has already found that the exercise of personal jurisdiction is proper and complies with both due process and the Delaware long-arm statute, venue in this district is also proper.

IV. CONCLUSION

For the foregoing reasons, IT IS HEREBY ORDERED that:

1. Jean's Motion to Dismiss (D.I. 856*)* is DENIED.

s/Gregory M. Sleet
UNITED STATES DISTRICT JUDGE

Dated: May 6, 2003

APPENDIX B- OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE DATED AND FILED JULY 8, 2003

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

IN RE: ELONEX PHASE II :
POWER MANAGEMENT LITIGATION : C.A. Nos.
:01-082 GMS; 01-083 GMS
:01-084 GMS; 01-085 GMS
:01-086 GMS; 01-087 GMS
:01-088 GMS; 01-089 GMS
:01-090 GMS; 01-091 GMS
:01-092 GMS; 01-093 GMS
:01-095 GMS; 01-096 GMS
:01-097 GMS; 01-098 GMS
:01-099 GMS; 01-100 GMS
:01-101 GMS; 01-102 GMS
:01-103 GMS; 01-104 GMS

JUDGMENT

AND NOW, this 8th day of July 2003, upon consideration of Plaintiff Elonex I.P. Holdings, Ltd. and EIP Licensing, B .V. 's ("Elonex") Motion for En.try of Default Judgment Against Jean Company, Ltd. ("Jean"), and having held a hearing thereon pursuant to Fed. R. Civ. P. 55(b) on June 18, 2003, the Court finds as follows:

On February 13, 2001, Elonex filed this patent infringement action against Jean Co., Ltd. ("Jean"), C.A. 0 1-097 (GMS), and the action was subsequently consolidated with 22 similar cases.

Jean failed to answer, move or otherwise plead to the

complaint, and on June 18, 2001, the Clerk of Court entered a default against Jean.

On January 31, 2003, Elonex filed a Motion for Entry of a Default Judgment Against Jean Company, Ltd. (the "Default Motion"). Jean entered an appearance in the action on February 20, 2003, and has participated fully in the proceedings since then.

Jean moved for an extension of time until April 21, 2003, to respond to the Default Motion, and the Court granted the motion. Instead of filing a response, on April 4, 2003, Jean filed a "Motion to Dismiss," raising the issue of personal jurisdiction.[1] The Court denied the motion by Memorandum and Order, dated May 6, 2003, holding that the Court had jurisdiction over Jean. Jean also filed an answer to the complaint on April 21, 2003, denying the allegations of the complaint and raising five affirmative defenses.

By Order dated May 16, 2003, the Court scheduled a hearing on the Default Motion for June 18, 2003. Late in the day on June 17, 2003, Jean filed a Memorandum in Support of Defendant's Jean Company, Ltd. Affirmative Defenses and Opposition to Plaintiffs' Motion for Entry of Default Judgment, requesting, among other things, discovery of Elonex.

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[1] While a motion to dismiss under Fed. R. Civ. P. 12 is not the appropriate procedural mechanism for contesting a default, the Motion to Dismiss raised issues which were germane to the propriety of entering the requested judgment.

Appendix B

At the hearing, plaintiffs called two witnesses, Michael B. Spiro, the Managing Director of EIP Licensing, B.V. and Dr. William O. Kerr, a damages expert. Jean's counsel appeared, cross-examined the witnesses and fully participated in the hearing.

Mr. Spiro testified to the importance of the plaintiffs' technology to the computer industry and the adoption by an industry group, VESA, of the DPMS standard. Elonex's previous research & development subsidiary, Oakleigh Systems, Inc., notified VESA in 1993 that the DPMS standard, which was about to issue, incorporated technology which was similar to that claimed in a pending.

While a motion to dismiss under Fed. R. Civ. P. 12 is not the appropriate procedural mechanism for contesting a default, the Motion to Dismiss raised issues which were germane to the propriety of entering the requested judgment. Oaldeigh Systems, Inc. patent application. VESA adopted the standard anyway, and as a result, by the time the first of the patents in suit had issued on February 14, 1995, use of the patented technology had become the industry standard. Elonex subsequently licensed approximately 35 companies, for a total in excess of $100 million.

Mr. Spiro also testified that Elonex notified Jean of its infringement on several occasions, beginning with an October 25, 2000 letter, and that Jean rebuffed repeated Elonex offers to take a license. In an effort to obtain information relating to the royalty base, Elonex obtained public documents in Chinese detailing Jean's monitor sales.

Dr. Kerr is a damages expert who holds a Ph.D. in

economics and regularly testifies on patent damages. He evaluated the factors identified in *Georgia-Pacific Corp. v. United States Plywood Corp.*, 318 F. Supp. 1116, 1121-22 (S.D.N.Y. 1970) and concluded that the reasonable royalty is $4.50 per monitor. He provided detailed calculations of the royalty base, the total reasonable royalty arid prejudgment interest. Dr. Kerr took into consideration market conditions, similar licenses entered into in the computer industry and Elonex's licensing history.

In making his calculations, Dr. Kerr deducted from the royalty base those sales made during periods for which Elonex was barred by 35 U.S.C. § 287 from collecting infringement damages, and sales of Jean monitors for which Viewsonic Corporation had paid a royalty. He also deducted approximately 23% of Jean's sales to the Americas, on the conservative assumption that these sales may have been made to countries other than the United States.

Jean cross-examined plaintiffs' witnesses and participated actively in the hearing, but did not offer any witnesses of its own. Jean did not offer any sales figures or other information that would have been probative of the issues before the Court. Instead, Jean offered only the Declaration of Robert Wen, the President of Jean, which had been filed the day before the hearing and almost two months after the April 21, 2003 date for filing a response.

The Court is entitled to assume the truth of all well-pleaded facts in the complaint. Fed. R. Civ. P. *55(b); see also Comdyne I. Inc. v. Corbin*, 908 F.2d 1142, 1149 (3rd Cir. 1990). Elonex avers that Jean sold infringing monitors

and presented additional evidence at the hearing in support of its claim. Jean has failed to rebut the facts pleaded in the complaint and the evidence submitted at the hearing. Accordingly, the Court finds that Elonex is entitled to a reasonable royalty under 35 U.S.C. § 284 in the amount of $3,630,762.00 together with prejudgment interest of $1,479,431.26.

Jean was on notice of Elonex's claim of infringement from the receipt of Elonex's October 25, 2000 notice letter. Jean was well aware of its infringing conduct. It indemnified its customers for infringement against Elonex's patent infringement claims, and paid Viewsonic Corporation ("Viewsonic") $1,031,982.96 to reimburse Viewsonic for royalty payments it made to Elonex on infringing monitors. There is no evidence that Jean sought or obtained a competent opinion of counsel. Jean was aware of Elonex' s infringement claim and these proceedings and willfully decided to continue its infringing conduct and to ignore the proceedings before this Court.

Jean's conduct was willful within the meaning of 35 U.S.C. § 284, and this is an appropriate case for assessing increased damages under § 284. The Court, therefore, awards Elonex enhanced damages in an amount equal to twice the reasonable royalty for sales made from October 25, 2000, in the total amount of $3,617,829.00.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that JUDGMENT ENTERED in favor of Elonex I.P. Holdings, Ltd. and EIP Licensing, B.V. and against Jean Co., Ltd. in the amount of $3,630,762.00,

together with enhanced damages of $3,617,829.00 and prejudgment interest of $1,479,431.26, for a total of $8,728,022.26.

Dated: July 8, 2003

s/Gregory M. Sleet
UNITED STATES DISTRICT JUDGE

APPENDIX C- HEARING TRANSCRIPT FOR THE U.S. COURT OF APPEALS FOR THE FEDERAL COURT-HEARING MAY 4, 2004

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

03-1573, 04-1010

IN RE ELONEX PHASE II POWER MANAGEMENT LITIGATION

ELONEX I.P. HOLDINGS, LTD. and EIP LICENSING, B.V.,

Plaintiffs-Appellees,

v.

JEAN CO., LTD.,

Defendant-Appellant,

and

KOREA DATA SYSTEMS CO., LTD., et al.

Defendants

Transcript of proceedings

Electronically recorded

Hearing on Appeal- May 4, 2004

ON APPEAL from the UNITED STATES DISTRICT COURT DISTRICT OF DELAWARE

In CASE NO(S). 01-CV-082 through 01-CV-093
01-CV-095 through 01-CV-104

WILCOX & FETZER

1330 King Street-Wilmington, Delaware 19801

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Appendix C

BEFORE:

CHIEF JUDGE MAYER
CIRCUIT JUDGE NEWMAN
CIRCUIT JUDGE GAJARSA

APPEARANCES:

MARTIN J. BLACK, ESQ.
DECHERT LLP
4000 Bell Atlantic Tower
1717 Arch Street
Philadelphia, Pennsylvania 19103-2793
for the Plaintiffs-Appellees,
Elonex I.P. Holdings, Ltd., and
EIP Licensing B.V.

CHRISTOPHER P. MURPHY, ESQ.
ARENT, FOX, KINTNER, PLOTKIN & KAHN, PLLC
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
for the Defendant-Appellant,
Jean Co., Ltd.

THE COURT: The next case will be 03-1573 and 04-1010, Elonex v. Jean Company. Mr. Murphy.

MR. MURPHY: Thank you, Your Honor. May it please the court, the Default Judgment of the court below cannot stand. Indeed, Your Honors, it cannot stand if we are going to respect the due process principles that define the scope of the court's power to enter such a judgment, and it cannot stand if we are to respect the territorial limits of our U.S. patents.

I understand I stand before the court representing Jean as the defaulting party below, but now is the time when we must pay particular attention to these principles.

Foremost, the District Court in Delaware had no authority to enter Default Judgment because of lack of personal jurisdiction over Jean. The touchstone of personal jurisdiction, of course, is the minimum contacts test, and Jean had no contact with Delaware. I know Elonex wants to convert national contacts into contacts with a specific state, but Jean had no specific contacts with Delaware, and in the --

THE COURT: Mr. Murphy, isn't this really a case very similar to Beverly Hills Fan Company?

MR. MURPHY: At first blush, Your Honor, I

agree it does bear some similarity. The striking difference, Your Honor, between this case and in Beverly Hills Fan is here Jean did not establish the channels of trade that brought the products -- that may have brought the products to Delaware. That act, that directing conduct towards Virginia in the case of Beverly Hills Fan is absent in this case.

To look at this we have to first step back and ask, well, first, are any monitors made by Jean actually in Delaware? To be sure, there is no evidence, there is no proof in this case, that a monitor made by Jean ended up in Delaware. What we must do, and what Elonex would like you to do, is reach the inference that because the monitors made it to the United States they must have, therefore, made it to Delaware.

THE COURT: Well, essentially, if I have a distribution system which distributes the product throughout the United States isn't there a presumption that it is throughout the United States? There was an allegation made in the complaint that the product was in Delaware.

MR. MURPHY: Indeed, Your Honor --

THE COURT: Now, was there any objection to that? Was there any rejection of that? Were they

placed on a burden of proof to that effect?

MR. MURPHY: I believe they were, Your Honor. And if I could divide that question into two parts: With respect to the distribution channel, what we learned, for example, from eMachines' SEC filing, its 10Q to the SEC, is that these companies are extremely concerned about demand. And eMachines instructs us that I must control my inventory very tightly. I must be able to meet market demand or I might fail as a company.

So the assumption that these kinds of products, computer products, where the prices are rapidly declining is not the kind of commodity that you are going to evenly distribute, warehouse and wait for demand to arise. What we have learned from eMachines and we have learned from Viewsonic is that they have to tap into demand very quickly.

What I would suggest this court do, if you are going to make the inference, if you are going to go from the number of monitors into the United States, you must make the factual nexus that will link it to the specific state that you believe you -- that you believe have -- are sufficient contacts.

For example, we can think of a parallel case in this court's guidance on commercial success, for

example. We simply can't say look, I sold millions of my widgets, therefore you must conclude that it was my invention that created the sales. This court is requiring a factual nexus. And what I'm suggesting here is if the Plaintiff, if the patentee is going to say look at all the monitors coming into the United States, and they want you to infer that they must have made it into Delaware, they have got to create a factual nexus that will allow you to make that leap.

CIRCUIT JUDGE NEWMAN: But what do you mean by factual nexus? You're saying that they have to establish a chain through the distribution chain. But is there any evidence of one actual presence in Delaware of any of the products made by Jean?

MR. MURPHY: Your Honor, there is no evidence of even a single monitor being in Delaware.

THE COURT: I suppose part of the reason for the absence of it --

MR. MURPHY: Your Honor, I --

THE COURT: -- or the evidence itself, is that fact that you were not participating.

MR. MURPHY: It's true, Your Honor, we were the defaulting party. The reason I believe we can't find a monitor in Delaware is because it didn't get

there.

THE COURT: Well, can you say that having not participated in the --

MR. MURPHY: I can say it.

THE COURT: The opportunity to make those kinds of arguments, I would think, would have been participating in the District Court.

MR. MURPHY: Your Honor, there is no doubt we're the defaulting party. But before we get to the issue of the default, before that judgment can stand as a legitimate judgment, we have to ask a question is does jurisdiction stand in that court? And Elonex wants to make the leap from the number of monitors coming into the United States to those now being in Delaware.

Here is what I know from the record. Elonex in their brief says 35 companies have paid us 100 million in royalties in settlement. We also know from their expert, Dr. Kern, their damages expert, that Elonex's royalty rate is at about a dollar fifty. We can do the math and convert that into number of units and that's roughly 66 million units that Elonex, assuming that royalty rate, 66 million units are coming into the United States.

The number of units that Jean is sending

into the United States is so paltry compared to that overwhelming number, to assume that they, without any other evidence, to assume that they went into Delaware would be an unreasonable inference to make.

CIRCUIT JUDGE NEWMAN: But this was -- that point was not argued in the District Court?

MR. MURPHY: Jurisdiction was raised, Your Honor. The jurisdiction of the court below was definitely raised.

CIRCUIT JUDGE NEWMAN: But the thoughts that you are now asking us to consider, were those issues raised before the District Court?

MR. MURPHY: My logic wasn't raised. The contention that we had no contacts with Delaware was most definitely raised below.

THE COURT: You're up here on a 60(b) denial, right, 60(b) motion denial?

MR. MURPHY: We're here on that, Your Honor, and we're here as well on the entry of default initially.

THE COURT: Right. Now, as far as the 60(b) motion was concerned was there any challenge to liability under that motion?

MR. MURPHY: Yes, Your Honor. The

challenge was directed to the contention that Jean did not have to compensate Elonex for monitors that were already licensed, and which is why below we had asked for the right for discovery.

THE COURT: But that's an issue of damages, though?

MR. MURPHY: It's also an issue of liability. I mean the best defense to have had infringement charges I'm permitted to do. What I did was not encompassed as infringement. But I still maintain, Your Honor, that before we get to that point, before we even have to raise the 60(b) motion, the validity of the Default Judgment must be considered. If the court did not have the power to enter that judgment, any failure -- the failings that we have on the 60(b) motion are academic because it could not have entered Default Judgment, the court could not have entered Default Judgment.

So if we assume, and it's something this court would have to do, if we assume that the monitors from Jean made their way through the stream of commerce to Delaware, there is no dispute that under everyone's theory of the stream of commerce you must establish that Jean was aware that the monitors came to Delaware.

Again, there is a complete absence on the record, Elonex did not meet its burden, that Jean was aware those monitors came to Delaware.

Again, I refer the court to the way the distribution of these monitors worked, and to eMachines' SEC 10Q, to the description of Viewsonic in its agreement with Jean on how it controlled its distribution scheme.

I also point the court to the IBM agreement. And the IBM agreement expressly said there is no agency relationship here.

In this market, where the computer companies are --

THE COURT: Well, is jurisdiction alleged on an agency relationship?

MR. MURPHY: No, Your Honor. My point is merely that Jean is not aware of where these monitors are going. That we learned from Elonex, for example, that the market demand placed upon them and their need to be a successful business, their need to control their retail chain, they must be able to supply monitors at the moment there is a demand. Viewsonic actually placed orders with Jean on a weekly basis to meet the demand. These monitor companies are not sharing with Jean where

the monitors are going to be going. Jean doesn't know whether they're going to Delaware, whether they're going to Wyoming, whether they're going to California.

THE COURT: But they do know that it's going interstate commerce in the U.S.? That's their -- basically they're selling into the U.S. commerce stream.

MR. MURPHY: Jean is selling monitors to customers who are in the United States, that's correct.

THE COURT: And it goes into the interstate commerce of the United States. I mean that's a presumption that we can all make, right?

MR. MURPHY: Nobody is disputing that these monitors didn't make their way to the United States and that they were -- that, absolutely, they were placed into the stream of commerce.

THE COURT: So you're disputing that there were no monitors sold in Delaware? There was an allegation in the complaint that they were sold in Delaware. There was never any objection to that because it was a default. If you had come in and objected to that allegation and said there is no personal jurisdiction here because there was no sales made in Delaware, then they would have had the burden of proving that.

MR. MURPHY: Well, Your Honor, I do believe they had the burden of proving it. Because we are a defaulting party does not mean that we have waived -- that we have waived the right that the court must establish --

THE COURT: Jurisdiction.

MR. MURPHY: -- jurisdiction.

THE COURT: We're in agreement on that. Take it to the next step. What about subject matter jurisdiction?

MR. MURPHY: It's a very similar proof problem, Your Honor, and that is an issue that can always be raised. There is no evidence on the record that Jean did anything that could be captured by our United States patents. We did not sell them in the United States. We did not offer to sell them in the United States. Obviously we don't make them in the United States, and we have got no presence in the United States, so we're not abusing them.

Again, this is a proof problem by Elonex. We raised it on appeal which we are permitted to do and they did not meet their burden.

THE COURT: The aspect of subject matter jurisdiction, if, in fact, I sell in the U.S. is that a

direct infringement issue then at that point or is that an inducement to infringe by others?

MR. MURPHY: If Jean actually sold the monitors in the United States, that would be -- assuming that to be true, that would be a direct.

THE COURT: That would be a direct infringement. Now, Jean did not sell any in the United States. They're all FOB overseas, China or Taiwan.

MR. MURPHY: China or Taiwan.

THE COURT: So because of that sale the title transferred in China or Taiwan, so they sold these products to users in the U.S.; is that an inducement?

MR. MURPHY: No, it isn't, because of again the facts of this case. These monitors are being made for the vendors in the United States. They're not our monitors. Jean -- another way to think of it is what Jean sells for --

THE COURT: It's an OEM type of a situation?

MR. MURPHY: Right. What Jean sells is manufacturing capacity. So they will make whatever monitor you want. In fact, because this is market driven and demand driven, Jean is going to make whatever the market is looking for. In this case they're happy

to be in industry standards, so it's probably the industry standard that's driving what's being made, not Jean seeking to do that.

THE COURT: Do they have a duty at that point to determine whether or not there are any patents that are covered by the U.S. banks?

MR. MURPHY: Yes, and indeed they did. The record reflects that Jean immediately began to design around an effort to avoid the patents.

I almost completely wiped out (inaudible to reporter) time to think.

THE COURT: All right. We'll give you a minute or so.

MR. MURPHY: Thank you. Mr. Black.

MR. BLACK: Thank you, Your Honor. This is the last of 27 patent infringement cases filed in the District of Delaware in relation to the same set of monitor power management patents. The cases began in December of 1998 and ended with the July 8th judgment against the -- 2003 judgment against Jean. There are over 60 Defendants involved in the litigation, a large consolidated proceeding. The judges shepherded it carefully with consolidated orders for scheduling, discovery and the trial.

Jean was well aware of the proceedings below, and made an intentional, willful decision not to participate.

THE COURT: I understand, Mr. Black, but for a Default Judgment is there an obligation to show that at least one of their product is within the geographic jurisdiction of the court?

MR. BLACK: We have an obligation to establish personal jurisdiction over the Defendant. The principal question with respect to personal jurisdiction, the overarching question is whether it's reasonable for the Defendant to be held to court. That can established in a number of different ways.

THE COURT: Well, if they're not physically present in the United States, and I think the cases show that -- that electronic presence is not sufficient.

MR. BLACK: I'm not relying on electronic presence. I'm relying on circumstantial evidence in this case which establishes beyond any reasonable doubt that Jean was doing business in Delaware and was well aware that its products were going to Delaware.

CIRCUIT JUDGE NEWMAN: But you never alleged that they were personally doing business in Delaware. As I recall it was that their products made

their way to Delaware because of the customers to whom they sold in China.

MR. BLACK: That's correct. The allegation is that their products went through the stream of commerce in Delaware.

CIRCUIT JUDGE NEWMAN: And there is no evidence of any one example?

MR. BLACK: No.

CIRCUIT JUDGE NEWMAN: I'm thinking of the Beverly Hills Fan case where, in fact, it was quite clear that the products were locally present in the jurisdiction.

MR. BLACK: The District Judge made a finding of fact and conclusion that based on the evidence before him that there were monitors that had been sent to Delaware by Jean. I want to address what that evidence is because I can see that's --

CIRCUIT JUDGE NEWMAN: That's a conclusion. That's a judgment. That's not evidence.

THE COURT: Tell us what that evidence was.

MR. BLACK: This is what the evidence was. The evidence is in some way circumstantial evidence but it is extraordinarily strong circumstantial evidence, the same kind of evidence that judges instruct juries

every day that they can accept is just as good -- is just as good as direct evidence. A man walks into a courtroom with a wet raincoat --

THE COURT: Well, what's the evidence?

MR. BLACK: The evidence was this. That they admit that there was an international distribution chain that begins with Jean, goes through Viewsonic, eMachines and other customers of Jean, that resell the products into states including Delaware. On page five of their brief they admit that. It is uncontested that there were several million monitors that were placed by Jean in that stream of commerce. It is inconceivable that none of those monitors made it to Delaware.

CIRCUIT JUDGE NEWMAN: Did you name the Delaware customers who received them?

MR. BLACK: Did we name them as --

CIRCUIT JUDGE NEWMAN: You say it's inconceivable, but did you name any Delaware entities that you say necessarily received them?

MR. BLACK: There were -- we did not have evidence of a particular customer who received a monitor if that is your question. We don't have the name of a particular customer.

What we have is an extraordinary --

CIRCUIT JUDGE NEWMAN: Do you have a monitor, an anonymous monitor present in Delaware?

MR. BLACK: We don't have the physical object of the monitor that was present in Delaware. What we have is an incredibly strong inference from facts of record that the monitors were sold in Delaware. We also have offers for sale that were directed to Delaware. The Viewsonic site, the website, had a Jean monitor on it, the E90F8 I believe it was. Undisputed that was a Jean monitor.

CIRCUIT JUDGE NEWMAN: And it wasn't (inaudible to reporter)to Delaware, was it? It was there at their internet site.

MR. BLACK: The internet site said if you want to buy our monitors go to our local distributors. You have a utility that said here is where you can find our local distributors.

CIRCUIT JUDGE NEWMAN: Did they name them?

MR. BLACK: When you click on the utility it gives you ten locations to buy the monitors within eight miles of the courthouse in Wilmington, Delaware.

CIRCUIT JUDGE NEWMAN: So that that is the total precise reference to Delaware on the website?

MR. BLACK: In that circumstance, yes. It

identifies retailers that sell Viewsonic products --

CIRCUIT JUDGE NEWMAN: Retailers? I thought you said distributors.

MR. BLACK: I'm sorry. I meant retailers. Circuit City, Best Buy, stores where consumers can go to buy the product. Just so I want to make sure it's clear. Viewsonic has a website with a picture of a Jean monitor on it. Viewsonic says you can buy it from our website or you can go to our stores which are Best Buy, Circuit City, et cetera.

CIRCUIT JUDGE NEWMAN: (Inaudible to reporter) Jean's website, right, (inaudible to reporter) Jean's website?

MR. BLACK: Viewsonic's website. This is offered to prove that the monitors were on sale in Delaware and were sold in Delaware.

CIRCUIT JUDGE NEWMAN: It has to be sold by Jean, doesn't it?

MR. BLACK: Not if you want to take advantage of the stream of commerce theory. Jean has to make the first sale in the link but that's admitted. As in Beverly Hills Fan, what happened in that case was a Chinese company, I'm sure Your Honor is well aware of your own decision, the Chinese company sold the

products, it's not even clear how it got to Virginia. Alltech is the Chinese company that made the product. The Royal New Jersey Company appears to have been in the distribution chain, proof of 53 fans in Virginia. That was the total quantum of proof that there was a national distribution chain which the Chinese company availed themself of for business in the United States.

Here we have a national distribution chain showing Wilmington monitors sold in the chain, some of which were offered for sale, I believe were sold in Delaware. The district judge did rely in part on circumstantial evidence but there is no reason why circumstantial evidence isn't admissible here.

There were other contacts as well that Jean had with Delaware. Jean's website where it indicated intent to do business in the State of Delaware (inaudible to reporter). Would not be a surprise to it. Jean had a service center in New Jersey which you recall it's East Coast Service Center. That was from Jean's website. That was where you would send monitors to be fixed. The east coast certainly covers Maine to Florida, but there is no dispute, no reasonable dispute, that it wouldn't cover in Jean's intention states with contiguous borders with New Jersey which include

Delaware.

Now, we submit that the issue here about proof is really why the Jean Company has had its say. We made substantial showing that there was proof that monitors were being sold in Delaware. Jean never denied that fact, which I think was also important to the District Court. Unlike in Beverly Hills Fan where the Chinese company came in and said we don't sell any products to anyone in Delaware, that never happened here. There are a number of suppliers that sold the monitors. Jean sold monitors to a lot of customers. There are 350,000 units which they admit in their papers infringe but they refused to identify who those customers were. Maybe some of those were in Delaware.

But certainly in a situation like this where Jean did appear they have an obligation at least to say we don't have a single customer located in Delaware.

That's not what their papers say. Their papers say we sold the products FOB China and had no idea where they went. It's not credible. The judge didn't find it to be credible.

Now, with respect to subject matter jurisdiction, it is very difficult to see how there is any reasonable subject matter jurisdiction argument

here. This is a patent case. It arises under the United States patent laws and we believe we have amply described in our brief how subject matter jurisdiction applies and we have addressed on that question.

With respect to default, I have heard no argument --

THE COURT: Well, before you leave subject matter jurisdiction, is it that easy? Jean does not produce in the U.S., does not sell in the U.S., its products are distributed by others in the U.S.

MR. BLACK: It certainly induces infringement in the U.S. by selling monitors here. What you heard Mr. Murphy say was that on a weekly basis Jean is engaging in discussions with Viewsonic and making weekly shipments to help Viewsonic monitor its distribution chain. Whether those discussions take place over the telephone or in the United States it doesn't matter. Jean is selling products to U.S. customers, inducing them to resell which is infringement, inducing people to use the products in the United States which is infringement.

The policy information (inaudible to reporter)otherwise are quite dramatic. If the court were to rule that subject matter jurisdiction would not

obtain in this circumstance foreign Defendants would essentially be insulated by the U.S. patent laws as long as they can take a declaration that they sold their products FOB China, FOB Germany or other.

THE COURT: But there is no direct infringement on their part.

MR. BLACK: There is direct infringement if they sold -- if they engaged in discussions, offers for sale in the United States. They have not ever said that didn't happen.

THE COURT: They seem to have insulated themselves from offers of sale or otherwise in the U.S. They sell everything overseas. They manufacture everything overseas. So is that an issue of direct infringement by them or is it an inducement to infringe?

MR. BLACK: There clearly is inducement to infringe and that's enough.

Second, we alleged in the complaint that there were sales in the United States by Jean and offers for sale. At this stage that's enough. The subject matter jurisdiction argument was only raised for the first time on appeal. It was never raised in the District Court. We didn't have any discovery. We did not --

THE COURT: Subject matter jurisdiction can be raised at any time.

MR. BLACK: It can be raised at any time. I'm not certain that it's inappropriate to raise it here. I'm just asserting that with respect to the record you have to look in the complaint, does it allege a claim within the jurisdiction of this court under the U.S. patent laws? And the answer there is clearly that it does. And we allege sales and offers for sales in the United States. They don't even really have the record evidence to reject even that proposition.

The record evidence they submitted includes massive contracts, a hundred pages long in some cases, describing the back and forth between Jean and their U.S. customers. It describes Jean coming to -- being obligated to come to the United States to service monitors, being obligated to maintain service facilities in the U.S. which would induce infringement. There is ample evidence to certainly ample allegation to support subject matter jurisdiction challenge.

THE COURT: But that's never been presented to the court really.

MR. BLACK: On a subject matter jurisdiction question first look at the complaint. If

the well-pleaded complaint pleads a cause of action under the statute you need go no further.

THE COURT: But if they challenge subject matter jurisdiction then you still have to prove that, right?

MR. BLACK: The allegations of the well pleaded complaint draw it, Your Honor. They challenge that you ultimately have to prove your claim, but there is certainly evidence in this case of inducement to infringe and offers for sale in the United States.

At bottom this is a default case. And Jean's complaints about the state of the record are their own making. Jean intentionally waited two years to participate in the proceedings and at the last minute comes in and says I can't be bound in the United States. There is no jurisdiction. Respectfully, this is a large company with a large population of monitors in the United States, that's taking advantage of the United States -- the United States commerce in a very big way. They should not be able to put their head in the sand to avoid the obvious facts and the obvious implications of their conduct and escape the jurisdiction of this court.

THE COURT: Thank you. Mr. Murphy, another minute.

MR. MURPHY: Thank you, Your Honor. With respect to subject matter jurisdiction and inducement, we have to keep in mind the role that Jean plays which is supplier of manufacturing capacity. We aren't designing our own monitors shipping into the United States and say go ahead, go ahead, don't worry about patents, make them. IBM, for example, came to Jean and said we need a 9 inch monochrome monitor, can you it for us? Sure. There is no evidence of inducement.

THE COURT: Do you have an indemnification from IBM?

MR. MURPHY: I'm sure we indemnify all of our customers.

THE COURT: Oh, you indemnify them?

MR. MURPHY: I don't know. It's not in the record. I don't know. As to personal jurisdiction, again we have to look in the context of how this market operates. Elonex points to the number of monitors, it doesn't tell the court that, for example, Viewsonic is getting monitors from nine other suppliers. They raise the issue of a monitor on Jean's website -- I'm sorry, on Viewsonic's website, but that monitor was a refurbished monitor. That monitor has gone even farther through the commercial chain and is now being offered

for sale. What is totally absent --

THE COURT: Thank you, Mr. Murphy.

MR. MURPHY: Thank you, Your Honor.

THE COURT: The case is submitted.

State of Delaware)
New Castle County)
CERTIFICATE OF REPORTER

I, Elaine G. Parrish, Registered Professional Reporter and Notary Public, do hereby certify that the audiotape provided to me was taken down by me in stenotype notes and thereafter transcribed into typewriting under my direction.

I further certify that the foregoing is a true and correct transcript of the testimony given at said examination of said witness.

I further certify that I am not counsel, attorney, or relative of either party, or otherwise interested in the event of this suit.

Elaine G. Parrish
Certification No. 170-RPR
(Expires January 31, 2005)

DATED: September 25, 2004

APPENDIX D- JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DATED AND FILED MAY 10, 2004

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record.

United States Court of Appeals for the Federal Circuit

03-1573, 04-1010

IN RE ELONEX PHASE II POWER MANAGEMENT LITIGATION

ELONEX I.P. HOLDINGS, LTD. and EIP LICENSING, B.V.,

Plaintiffs-Appellees,

v.

JEAN CO., LTD.,

Defendant-Appellant,

and

KOREA DATA SYSTEMS CO., LTD., KOREA DATA SYSTEMS AMERICA, INC., TAIWAN VIDEO & MONITOR CORP., TVM VIDEO & MONITOR USA CORP., TVM PERIPHERALS, INC., ENVISION PERIPHERALS, INC., PROVIEW INTERNATIONAL HOLDINGS LTD., PIXIE TECHNOLOGIES, INC., LG ELECTRONICS, INC., KUO FENG CORP., NEC CORP., LITE-ON TECHNOLOGY CORP., ADI CORP., CHUNTEX ELECTRONICS CO., LTD., TATUNG CORP., ACER COMMUNICATIONS & MULTIMEDIA, INC., SMILE INTERNATIONAL, INC., TOP VICTORY ELECTRONICS (TAIWAN) CO., LTD:,

CTX INTERNATIONAL, NECX DIRECT, LLC, and AOC INTERNATIONAL,

Defendants.

Judgment.

Appendix D

ON APPEAL from the UNITED STATES DISTRICT COURT DISTRICT OF DELAWARE

In CASE NO(S).01-C V-082 through 01-C V-093
01-C V-095 through 01-CV-104

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

Per Curiam (MAYER, Chief Judge, NEWMAN and GAJARSA, Circuit Judges):

AFFIRMED. See Fed. Cir. R. 36.

ENTERED BY ORDER
OF THE COURT

DATED: MAY 10, 2004

s/ Jan Horbaly
Jan Horbaly, Clerk

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT
MAY 1 0 2004
JAN HORBALY
CLERK

APPENDIX E- ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT DATED AND FILED JULY 2, 2004

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

03-1573, 04-1010

IN RE ELONEX PHASE II POWER MANAGEMENT LITIGATION

ELONEX I.P. HOLDINGS, LTD. and EIP LICENSING, B.V.,

Plaintiffs-Appellees,

v.

JEAN CO., LTD.,

Defendant-Appellant,

and

KOREA DATA SYSTEMS CO., LTD., KOREA DATA SYSTEMS AMERICA, INC., TAIWAN VIDEO & MONITOR CORP., NM VIDEO & MONITOR USA CORP., NM PERIPHERALS, INC., ENVISION PERIPHERALS, INC., PROVIEW INTERNATIONAL HOLDINGS LTD., PIXIE TECHNOLOGIES, INC., LG ELECTRONICS, INC., KUO FENG CORP., NEC CORP., LITE-ON TECHNOLOGY CORP., ADI CORP., CHUNTEX ELECTRONICS CO., LTD., TATUNG CORP., ACER COMMUNICATIONS & MULTIMEDIA, INC., SMILE INTERNATIONAL, INC., TOP VICTORY ELECTRONICS (TAIWAN) CO., LTD., CTX INTERNATIONAL, NECX DIRECT, LLC, and AOC INTERNATIONAL,

Defendants.

ORDER

Appendix E

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on July 9, 2004.

FOR THE COURT,
s/ Jan Horbaly(AV)
Jan Horbaly
Clerk

Dated: July 2, 2004

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

cc: Christopher P. Murphy
Martin J. Black

JUL -2 2004

ELONEX IP HOLDINGS v JEAN CO, 03-1573, 04-1010
(DOT - 0l-CV-82)

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

(2)

Supreme Court, U.S.
FILED
DEC 16 2004
OFFICE OF THE CLERK

No. 04-463

IN THE

Supreme Court of the United States

JEAN CO., LTD.,

Petitioner,

v.

ELONEX I.P. HOLDINGS, LTD., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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DECEMBER 16, 2004

COUNTER STATEMENT OF QUESTION PRESENTED

The District of Delaware held that it had personal jurisdiction over a Taiwanese maker of computer monitors that it found had (1) intentionally placed millions of infringing computer monitors into the stream of United States commerce in established distribution channels that it knew serviced the State of Delaware; and (2) established channels for providing service, repairs and technical assistance to customers in Delaware. The Federal Circuit affirmed summarily.

The question presented is whether the district court found facts sufficient to support personal jurisdiction consistent with the Due Process Clause of the Fifth Amendment.

LIST OF PARTIES

The petition misidentifies the parties to the proceeding in the court of appeals. Petitioner Jean Co., Ltd., was the appellant below, and respondents Elonex I.P. Holdings, Ltd., and EIP Licensing, B.V., were appellees. The remaining entities listed on page ii of the petition were defendants in 21 related cases the district court consolidated with respondents' patent infringement action against petitioner. These entities did not participate in the proceeding before the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Respondent Elonex I.P. Holdings, Ltd., is a wholly-owned subsidiary of the Oakleigh Trust, which has an address of P.O. Box 119, Commerce House, St. Peter Port, Guernsey, GY1 3HB. Respondent EIP Licensing, B.V., is a wholly-owned subsidiary of Elonex plc, which has an address of 2 Aspley Way, London NW2 7LF, England. No publicly held companies hold any stock of respondents.

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OPINIONS BELOW

The district court's opinion denying Jean Co. Ltd.'s motion to dismiss is unreported. Pet. App. 1a-8a. The District Court's opinion denying Jean's motion for relief under Rule 60(b) of the Federal Rules of Civil Procedure appears at page A13 of the joint appendix in the court of appeals[1] and is reported at 279 F. Supp. 2d 521 (D. Del. 2003). The Federal Circuit's summary affirmance (Pet. App. 43a-44a) is reported at 97 Fed. Appx. 329 (2004).

JURISDICTION

The Federal Circuit's judgment was entered on May 10, 2004. Jean's petition for panel rehearing and rehearing en banc was denied on July 2, 2004. Pet. App. 45a-46a. Jean misstates the basis for this Court's jurisdiction. This Court has jurisdiction to review the Federal Circuit's judgment under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Jean misidentifies the constitutional provision at issue in this case. In patent infringement actions, which involve a federal question, the Due Process Clause of the Fifth Amendment to the United States Constitution governs the inquiry into personal jurisdiction. It provides in pertinent part that "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

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[1] Subsequent page citations to the joint appendix in the court of appeals will appear in the format: "A___".

STATEMENT

Respondents Elonex I.P. Holdings, Ltd., and EIP Licensing, B.V. (collectively, "Elonex") are, respectively, the owner and exclusive licensee of U.S. Patent Nos. 5,389,952, 5,648,799, and 5,880,719 (the "Patents in Suit"). The Patents in Suit disclose apparatuses and methods for reducing the power consumption of a computer monitor by causing circuits in the monitor to shut down when the computer is not in use. The patented technology was adopted as an industry standard, resulting in widespread infringement by the international computer and monitor industry. A164-66.

This is one of 27 patent infringement cases that Elonex filed against over 60 computer and monitor vendors in the District of Delaware in 1998, 1999 and 2001. The defendants included Dell Computer Corp.; Sony Electronics, Inc.; Gateway, Inc.; Compaq Computer Corporation; and Apple Computer, Inc.; as well as numerous Taiwanese, Japanese, and Korean monitor manufacturers. Judge Gregory M. Sleet, to whom the cases were assigned, consolidated the actions filed in 2001 as *In re Elonex Phase II Power Management Litigation.* Every one of these matters has been either settled or resolved by a non-appealable judgment. Elonex has licensed 35 companies under the Patents in Suit with total licenses, settlements, and judgments exceeding $100 million. A10.

Jean, a large Taiwanese monitor manufacturer, sells hundreds of thousands of computer monitors worth millions of dollars into the U.S each

year. Faced with Elonex's patent infringement claims, Jean made a deliberate, tactical decision to refuse to participate in the litigation.[2] A11, A931. When Elonex moved for a default judgment, Jean appeared – two years after the filing of the complaint and 20 months after the entry of default – and claimed that "the complete absence of activity by JeanCo within either Delaware or the entire United States precludes jurisdiction." A703. The district court roundly rejected that contention, found Jean's default and post-appearance litigation conduct to be in bad faith, and entered judgment against Jean after a one-day damages trial. A8, A17. Chief Judge Mayer and Judges Newman and Gajarsa summarily affirmed the judgment one week after oral argument, and the full Federal Circuit denied Jean's petition for rehearing en banc without dissent.

1. Jean Placed Millions of Computer Monitors Into the Stream of U.S. Commerce in Well-Established Distribution Channels Leading to Delaware and Served the Delaware Market for Its Monitors

In 2000, Jean sold over 3.3 million computer monitors worldwide and, in 2001, over 1.7 million monitors. A973. Jean's sales are heavily weighted to the U.S. market. Jean concedes that it sold over

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[2] Jean's Statement of the Case mischaracterizes or entirely omits facts material to consideration of the question presented and misstates the basis for federal jurisdiction in the district court. The district court had original jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1338(a). The provision Jean cites, 35 U.S.C. § 271, creates a cause of action for patent infringement and does not confer jurisdiction.

1.2 million monitors in the U.S. in 2000 and over 700,000 monitors in 2001. A1175. Even after Elonex gave Jean actual notice of infringement in October 2000, Jean continued to sell monitors into the U.S. In all, from November 2000 to December 2002, Jean sold 1,317,697 monitors into the U.S. A1144.

Jean has numerous U.S. customers. In 1995, 1996, 2000, and 2001, for example, Jean sold 1,547,821 monitors to ViewSonic Corporation, 236,955 monitors to IBM, 14,508 monitors to "PGS," 248,840 monitors to "KDS," and 349,239 monitors to "other" customers, for a total of 2,397,363 U.S. monitor sales. A1175. Jean's monitors were sold throughout the U.S., including Delaware. In 1999, one of Jean's largest customers, eMachines, Inc., purchased approximately $54,525,960 worth of monitors from Jean, accounting for 12.94% of Jean's worldwide monitor sales. A803, A806. Of the sales by eMachines, fully 54.8% of revenues were from sales to national chain stores like Best Buy, Office Depot, and Circuit City, all of which have outlets in Delaware. A778. During this period, eMachines purchased monitors from only two vendors – Jean and KDS (which was also a Jean customer). A775, A1175.

Another Jean customer, ViewSonic, also has a well-established retail distribution network throughout the U.S. and in Delaware. ViewSonic monitors are available from Best Buy, Office Depot, and CompUSA, all of which have outlets in Delaware, and from internet retailers such as Amazon.com and Buy.com. For example, ViewSonic

advertised a refurbished Jean monitor, on its website, stating that "displays and projectors are only available through ViewSonic resellers." The website lists no fewer than 10 resellers within a 7.5 mile radius of downtown Wilmington, Delaware. A736, A785-89.

Jean's website – which is in English – confirms that Jean intentionally directs sales to U.S. customers. The website identifies a "USA" sales representative, who can be reached via email. The website touts Jean's "Global Service Centers" and directs Delaware purchasers of Jean monitors to its "East Coast" service facility in nearby New Jersey. Purchasers of Jean monitors can also use Jean's website to download driver software and obtain technical support via e-mail. A792-98.

Finally, Jean specifically designed the power management features of its monitors for the U.S. market and obtained relevant U.S. government certifications. The U.S. EPA's Energy Star® Program provides certifications regarding monitor power consumption, the object of the Patents in Suit. Jean sought and obtained certifications for at least 16 monitors under the program. These certifications are important to U.S. monitor vendors, and Jean covenanted to ViewSonic that all of its monitors sold in the U.S. would comply with the Energy Star® Program. A851. The EPA lists Jean's Energy Star® compliant monitors on its website. A800.

2. Despite Prodigious U.S. Monitor Sales, Jean Intentionally Defaulted

Elonex notified Jean of its infringement on October 25, 2000, and filed suit on February 13, 2001. Over the next two years, Elonex repeatedly contacted Jean to persuade it to participate in the proceedings. Jean was well aware of the litigation and consulted lawyers in Taiwan and California. Despite Elonex's efforts, Jean made a strategic decision not to appear. A934-36, A1245-52.

On June 18, 2001, the clerk entered a default against Jean under Rule 55(a). On June 28, 2001, Jean's California attorney wrote to Elonex requesting a copy of the complaint and stating that "[u]pon our receipt of same, we will immediately evaluate the exposure and accordingly make recommendation to JeanCo." A1247. For nearly two years, however, Jean did not respond. On January 31, 2003, Elonex moved for a default judgment. On February 20, 2003 – twenty months after its default – Jean finally appeared. On March 14, 2003, Jean moved to dismiss for lack of personal jurisdiction. Jean did not deny that its monitors were sold in Delaware. Jean instead claimed that it sold and delivered all of its monitors in Taiwan and that it had little or no understanding of their ultimate destination. A706. In response to Elonex's evidence demonstrating that Jean intentionally sold millions of monitors into the U.S., Jean claimed that it had "no control over the sales patterns of its customers, and has not established a distribution network for its products." A817. Notably, Jean did not challenge, then or at any time, the fact that its monitors were shipped

through the stream of commerce into Delaware. Nor did Jean deny that it had customers in Delaware.

On May 6, 2003, the district court denied the motion to dismiss, applying the Federal Circuit's decision in *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558 (Fed. Cir. 1994). As we discuss in more detail *infra* at 13-14, *Beverly Hills Fan* is the leading Federal Circuit decision on personal jurisdiction in the stream of commerce context. The case does not adopt the minimum contacts holding of either plurality opinion in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987). Here, the district court found that "Jean has, for many years, been the first link in precisely the kind of indirect distribution chain" that the Federal Circuit has "held sufficient to establish personal jurisdiction":

> Specifically, Jean sells its monitors to ViewSonic and eMachines, who in turn distribute Jean's monitors to retailers with Delaware operations. Given ViewSonic's and eMachines' extensive re-seller networks in Delaware and on the Internet, Jean cannot credibly claim it had no inkling that some of its monitors would make their way into Delaware via well-established distribution channels. (A4)

The district court further concluded that Jean's placement of monitors into the stream of commerce leading to Delaware, combined with its "interactive website" and "East Coast" service facility in New Jersey, constituted "purposeful minimum contacts" with Delaware that satisfied the requirements of

both due process and the Delaware long-arm statute. A5-6.

After denying Jean's motion to dismiss, the district court scheduled a hearing on Elonex's motion for default judgment for June 18, 2003. A826. At 3:40 p.m. on June 17, the day before the hearing, Jean filed a brief in opposition and a declaration conceding that "Jean considered with its customers the possibility of the monitors being resold in the United States" and that Jean had paid ViewSonic $1,031,982.96 for infringement of Elonex's patents. The declaration also attached portions of Jean's contracts with ViewSonic and IBM, which clearly showed that Jean knew of the monitors' ultimate destination. A834.[3]

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[3] The 20-page IBM agreement discusses the parties' relationship in great detail and contradicts Jean's earlier contention that all sales were made solely through agreements reached in Taiwan. The contract requires that "all procurement, business and administrative communications" by Jean be directed to an IBM "Business Coordinator" in Charlotte, North Carolina. Jean agreed to indemnify IBM for patent infringement and to litigate disputes in New York courts. A901, A904, A908. The ViewSonic agreement describes an even more extensive relationship involving detailed procedures for ViewSonic to issue purchase orders from the U.S. and for Jean to fill them. Jean is required to "prepare shipping documents in full compliance with United States Customs requirements." A862. Jean undertook broad responsibility for servicing and fixing monitors shipped into the U.S. and agreed to "support and service the Product in all ViewSonic markets as may be designated from time to time." A838. As part of this obligation, Jean committed to maintaining an after-sales support organization and to provide "repair work and after-sales services for the Products locally in North America." A877, A885. Jean agreed to travel to California to conduct a training

Jean participated actively in the June 18 hearing, presenting arguments and cross-examining Elonex's witnesses, though not offering any witnesses of its own. At the close of the hearing, the district court found Jean's default and post-appearance conduct to be in bad faith. A931. On July 8, 2003, the district court entered judgment awarding Elonex $3,630,762 in damages, together with prejudgment interest of $1,479,431.26. Finding that "Jean was aware of Elonex's infringement claim and these proceedings and willfully decided to continue its infringing conduct," the district court also assessed increased damages of $3,617,829. A11-12.

On August 7, 2003, Jean filed a notice of appeal and a motion for relief from judgment under Rule 60(b). Three months after the district court's personal jurisdiction ruling, Jean presented a table of what it contended were "the actual numbers of Jean monitors sold in Taiwan and shipped to the U.S.," including over 300,000 monitors for which Jean refused to identify a purchaser or U.S. destination. A1175. The district court found Jean's "facially meritless" motion to be "clearly another example of continuing bad faith" and ordered Jean and its counsel to pay the attorneys' fees Elonex incurred in responding. A17-18.

On September 29, 2003, Jean appealed the Rule 60(b) denial. On October 10, 2003, the Federal

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session for each release of a new monitor design. A878. Jean agreed to indemnify – and, in fact, paid – ViewSonic for patent infringement. A843.

Circuit consolidated Jean's appeals. On May 10, 2004, after full briefing – and less than a week after oral argument – the Federal Circuit affirmed without opinion. On June 7, 2004, Jean petitioned for rehearing and rehearing en banc, relying on grounds identical to those presented in Jean's pending petition for writ of certiorari. The court did not call for a response to Jean's petition, and on July 2, 2004, the full Federal Circuit denied the petition without dissent.

REASONS FOR DENYING THE PETITION

Jean's petition is not remotely certworthy. Jean first argues that the courts of appeals are split over the meaning of *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987), and, in particular, the application of what are seen as two different tests for "purposeful availment" in the stream of commerce context. Whatever the extent of any confusion in the other circuits, however, the *Federal* Circuit – which issued the decision that Jean asks this Court to review – has consistently *refused* to take sides with one of the *Asahi* opinions or the other and did not take sides in this case. Indeed, the district court held, and the Federal Circuit agreed, that it had personal jurisdiction because Jean's activities in the District of Delaware met the standards of *both* the *Asahi* opinions. This petition does not present the Court with an opportunity to resolve any putative split.

Jean's second argument is simply this: that the district court committed clear error in finding those jurisdictional facts, and that the Federal

Circuit erroneously blessed the district court's findings. Jean is wrong – very wrong – as the Federal Circuit made clear by summarily affirming. If error correction *ever* warrants this Court's attention, it hardly warrants it here.

I. The Federal Circuit's Summary Affirmance in This Case Does Not Conflict With the Minimum Contacts Jurisprudence of This Court or the Decisions of the Lower Federal Circuits

Jean claims that the Federal Circuit's ruling "*effectively* rejects" the due process requirement that a foreign defendant purposefully establish minimum contacts with the forum state, Pet., at 12 (emphasis added). But it defies common sense to argue that the Federal Circuit abolished the minimum contacts requirement without even issuing an opinion.[4]

Similarly, Jean's allegation that the decision below creates a circuit conflict hinges on a fundamental misinterpretation of the Federal Circuit's and the other courts of appeals' applications of this Court's opinions in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), and *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987). In *World-Wide Volkswagen*, the Court held that a

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[4] Jean also claims that the "First, Fourth and Sixth Circuits require a defendant to commit an act purposefully directed to the forum, while other [circuits] do not." Pet., at 7. That, too, is incorrect. All of the lower federal courts require purposeful availment and have since 1958 when the Court held in *Hanson v. Denckla* that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State." 357 U.S. 235, 253 (1958).

defendant's forum-directed activity provides clear notice that it should "reasonably anticipate being haled into court there." 444 U.S. at 297. The Court also confirmed (in dicta) that intentional forum-directed activity using the stream of commerce constituted purposeful availment:

> [I]f the sale of a product of a manufacturer . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer . . . to serve directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States. . . . The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State. (*Id.* at 297-98.)

In *Asahi*, the Court divided on the specific requirements for purposeful availment in the stream of commerce context. Four Justices concluded that "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State." 480 U.S. at 112 (O'Connor, J.). Justice O'Connor's plurality opinion required additional conduct indicating "an intent or purpose to serve the market in the forum State." *Id.* Four other Justices, however, considered such an additional showing unnecessary:

> The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale. As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise. (*Id.* at 117 (Brennan, J.))

In the 17 years since *Asahi*, the circuit courts have carefully navigated the pluralities' differing stream of commerce theories. Of critical import here is the tack of the Federal Circuit. In *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558 (Fed. Cir. 1994), the Federal Circuit *declined* to choose one view over another, given the facts of record in that case, because "under either version of the stream of commerce theory, plaintiff made the required jurisdictional showing." *Id.* at 1566. Indeed, most of the other federal circuits have done the same, either by finding that the record satisfies both standards,[5] or by relying on the dicta in *World-Wide Volkswagen*.[6]

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[5] *See Kernan v. Kurz-Hastings, Inc.*, 175 F.3d 236, 244 (2d Cir. 1999); *Pennzoil Products Co. v. Colelli & Assocs., Inc.*, 149 F.3d 197, 207 n.11 (3d Cir. 1998); *Shute v. Carnival Cruise Lines*, 897 F.2d 377, 382 n.3 (9th Cir. 1990), *rev'd on other grounds*, 499 U.S. 585 (1991); *Vermeulen v. Renault, U.S.A., Inc.*, 985 F.2d 1534, 1548 (11th Cir. 1993).

[6] *See Ruston Gas Turbines, Inc. v. Donaldson Co.*, 9 F.3d 415, 420 (5th Cir. 1993); *Dehmlow v. Austin Fireworks*, 963 F.2d 941, 946-47 (7th Cir. 1992); *Barone v. Rich Bros. Interstate*

In this case, the district court expressly applied *Beverly Hills Fan* in concluding that Jean's activities constituted purposeful minimum contacts with Delaware. A4-5. The parties' briefs to the Federal Circuit agreed that *Beverly Hills Fan* was controlling. Oral argument centered on the proper interpretation of that decision. Pet. App. 15a-42a. And while the Federal Circuit saw no need to issue even an unpublished opinion in this case, its summary affirmance undoubtedly relied on *Beverly Hills Fan*. Jean points to a supposed circuit conflict in citing to three circuits that have expressly adopted Justice O'Connor's standard in *Asahi*,[7] but the conflict is not at issue here: a decision finding *both Asahi* standards satisfied is consistent with any view of what the Due Process Clause requires.

The lack of a conflict is particularly clear given the procedural history of this case. The Federal Circuit entered a judgment of affirmance without opinion against Jean under Federal Circuit Rule 36. That rule applies to judgments where "an opinion would have no precedential value." A decision favoring one *Asahi* standard over the other would have created a new precedent in the Federal Circuit, a fact that the panel (which included the author of the *Beverly Hills Fan* opinion)

Display Fireworks Co., 25 F.3d 610, 614 (8th Cir.), *cert. denied*, 513 U.S. 948 (1994).

[7] *See, e.g., Boit v. Gar-Tec Products, Inc.*, 967 F.2d 671, 682-83 (1st Cir. 1992); *Lesnick v. Hollingsworth & Vose Co.*, 35 F.3d 939, 945 (4th Cir. 1994), *cert. denied*, 513 U.S. 1151 (1995); *Bridgeport Music, Inc. v. Still N The Water Publ'g*, 327 F.3d 472, 480 (6th Cir.), *cert. denied*, 124 S. Ct. 399 (2003).

would likely have recognized. Further, Jean petitioned for rehearing en banc. Rule 35 of the Federal Rules of Appellate Procedure limits en banc determinations to situations where (1) "the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed"; or (2) "questions of exceptional importance." Fed. R. App. P. 35(b). Here, the full Federal Circuit considered the precise question that Jean presents to this Court for review and, without calling for a response, denied Jean's petition without dissent. Jean's asserted conflict simply does not exist.

II. The Decision Below Was Correct

A. Jean's Mistaken Effort at Error Correction Is Not a Basis for Review

Lurking beneath Jean's mistaken claim of a circuit conflict is an equally mistaken request for this Court to correct alleged errors by the district court and the court of appeals. This Court, however, should not grant review to correct errors in fact finding.

The petition repeatedly claims that Jean committed no act purposefully directed to Delaware and that the courts below relied "solely" on Jean's knowledge that its products would enter Delaware through the stream of commerce. Pet., at 5, 6, 9, 11. The district court's express findings – affirmed on appeal – contradict these assertions. In addition to finding that Jean intentionally placed its monitors into established distribution channels leading to

Delaware, the district court found that Jean's "interactive website" and "East Coast" service facility constituted "purposeful minimum contacts with Delaware." A4-5. The Federal Circuit concurred in those findings of fact. Jean's unsubstantiated challenge to those findings hardly warrants review by this Court.

B. Under Either *Asahi* Stream-of-Commerce Theory, Jean Established Purposeful Minimum Contacts With Delaware

In any event, the decision below is correct. The Federal Circuit affirmed the district court's conclusion that Jean's activities constituted "purposeful minimum contacts with Delaware." A5-6. The record fully supports this determination and satisfies both *Asahi* stream of commerce theories.

Jean's petition concedes, as it must, that the record satisfies Justice Brennan's plurality opinion. Pet., at 6-7. Jean sold millions of monitors to eMachines, ViewSonic, and other U.S. companies, who then re-sold the monitors throughout the U.S. EMachines and ViewSonic distributed Jean monitors to large retailers with outlets in Delaware. These Delaware retailers, in turn, sold the monitors directly to Delaware consumers. Pet., at 6-7; A778, A785-88. Both eMachines and ViewSonic offered to sell the monitors throughout the U.S. via their internet websites. A787-91. Jean was well aware of the regular and anticipated flow of its products from manufacture to distribution to retail sale in Delaware. A4.

The record also amply supports the conclusion that Jean's conduct evidenced "an intent or purpose to serve the market in the forum State" under Justice O'Connor's plurality opinion. 480 U.S. at 112. Jean's interactive website and its affirmative decision to provide repairs and technical assistance to its Delaware customers through an "East Coast" service center show that Jean intentionally "establish[ed] channels for providing regular advice to customers" in Delaware. *Id.* Jean's contract with ViewSonic, moreover, affirmatively obligated Jean to "support and service the Product in *all* ViewSonic markets," A838 (emphasis added), and Delaware is a ViewSonic market, A785-87.[8]

Most telling, however, is what Jean did *not* say at any point in the litigation – which is that it did not have any Delaware customers. Jean refused to identify the purchasers or ultimate U.S. destinations for 300,000 monitors that it admitted infringed the Patents in Suit. A1175. Jean *never* denied Elonex's allegation that its monitors were sold in Delaware. The district court justifiably concluded

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[8] On this record, even the circuit courts on whose decisions Jean relies would find purposeful conduct directed to Delaware. *See Boit*, 967 F.2d at 683 ("There is no evidence in the record that Gar-Tec . . . established channels for providing regular advice to customers in Maine . . . ."); *Lesnick*, 35 F.3d at 947 ("[T]he result might be different if Hollingsworth & Vose had . . . set up a customer relations network [for Maryland]."); *Bridgeport Music*, 327 F.3d at 480 ("Bridgeport does not assert that NTW entered into a distribution agreement with RAL or any other party that placed an affirmative obligation upon the third party to distribute NTW's compositions in Tennessee or elsewhere.").

that Jean was less than candid about its U.S. and Delaware contacts. A16-17.

This is simply not a case in which a hapless, foreign company sold a few products to someone overseas and was then terribly surprised to find that its wares had been shipped to the U.S. There is nothing "random, fortuitous, or attenuated" about Jean's contacts with Delaware or the possibility Jean would be sued there. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985). Indeed, Jean's infringing conduct continued unabated even after Elonex gave Jean actual notice of its infringement and this litigation in October 2000. A733-34. Jean paid over $1 million for royalties and legal fees on an indemnity claim from ViewSonic regarding the Delaware litigation. A914-15. Jean cannot honestly claim it had no fair warning that its activities might subject it to litigation in Delaware.

Jean believed, erroneously, that it could immunize itself from personal jurisdiction and patent infringement claims by selling its monitors free on board Taiwan. That, of course, has not been the law since this Court decided *International Shoe* in 1945.[9] As the district court and the court of appeals

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[9] *See International Shoe Co. v. Washington*, 326 U.S. 310, 314, 320 (1945) (sales "f.o.b. from points outside Washington" sufficient to support personal jurisdiction); *see also Renner v. Lanard Toys Ltd.*, 33 F.3d 277, 282 (3d Cir. 1994) ("Nothing in Justice O'Connor's plurality opinion [in *Asahi*] suggests that the fact that a foreign manufacturer or seller rids itself of title by a sale F.O.B. a foreign port is enough to insulate that manufacturer or seller from jurisdiction if there is the other type of activity to which the plurality opinion referred.").

correctly concluded, Jean established purposeful minimum contacts with Delaware.

C. Rule 4(k)(2) of the Federal Rules of Civil Procedure Is an Alternative Ground for the Federal Circuit's Judgment That Obviates Any Need to Reach the Question Raised in Jean's Petition

Finally, Jean's dubious claim of its "complete absence . . . within either Delaware or the entire United States," A703, provides another reason to deny the petition. As Elonex argued before the court of appeals, even if the court were to conclude that Jean did not have minimum contacts with Delaware, personal jurisdiction nevertheless exists under the federal long-arm statute, Rule 4(k)(2) of the Federal Rules of Civil Procedure. Under Rule 4(k)(2):

> If the exercise of jurisdiction is consistent with the Constitution and laws of the United States, serving a summons or filing a waiver of service is also effective, with respect to claims arising under federal law, to establish personal jurisdiction over the person of any defendant who is not subject to the jurisdiction of the courts of general jurisdiction of any state.

This provision applies if (1) the case arises under federal law; (2) the foreign defendant lacks sufficient contacts with any single state to subject it to jurisdiction there; and (3) the foreign defendant has sufficient contacts with the U.S. as a whole to satisfy due process. *See U.S. v. Swiss Am. Bank,*

Ltd., 191 F.3d 30, 38 (1st Cir. 1999). Here, this patent infringement action arises under federal law. Jean's claimed "absence" from "Delaware or the entire United States" satisfies the second requirement. And Jean plainly has constitutionally sufficient minimum contacts with the U.S. as a whole, by reason of (1) its admittedly substantial and regular annual sales of hundreds of thousands of monitors worth millions of dollars to U.S. companies; (2) its maintenance of training and repair personnel and facilities in the U.S. pursuant to contracts with IBM and ViewSonic; (3) its power management certifications from the E.P.A.; (4) its million-dollar indemnification payment to ViewSonic; and (5) its interactive English-language website, which is accessible throughout the U.S. Given its extensive monitor sales and other activity directed toward the U.S., Jean could reasonably have anticipated "being haled into Court [in the U.S.]." *Asahi*, 480 U.S. at 119.

Thus, even if Jean's contacts with Delaware were somehow wanting, Rule 4(k)(2) obviates any need for the Court to reach the question raised in Jean's petition. This case presents precisely the kind of situation that Rule 4(k)(2) was intended to address: a foreign company with millions of dollars in annual U.S. sales seeking to escape liability for violations of federal law on a jurisdictional technicality.

* * * *

Jean urges the Court "to affirmatively answer the question left open . . . in *Beverly Hills Fan*."

Pet., at 7. The decision below leaves that question open, which is why this Court has no occasion now to answer it. In any event, the question has been open for ten years. And in the last ten years, the current Justices of the Court have denied certiorari at least three times in cases squarely presenting questions about the proper application of stream of commerce theory. *See, e.g., Bridgeport Music, Inc. v. Still N The Water Publishing*, 540 U.S. 948 (2003); *Lesnick v. Hollingsworth & Vose Co.*, 513 U.S. 1151 (1995); *Hosoya. Fireworks Co., v. Barone*, 513 U.S. 948 (1994). Whatever reasons the Court had for denying certiorari in those cases – with full records and explanatory appellate opinions – are magnified in this case, with a record plainly satisfying both *Asahi* plurality opinions, no appellate opinion, and a defendant whose conduct the district court repeatedly found to be in bad faith.

CONCLUSION

The petition for writ of certioriari should be denied.

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(3)

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In The

Supreme Court of the United States

JEAN CO., LTD.,

Petitioner,

v.

ELONEX I.P. HOLDINGS, LTD. and
EIP LICENSING, B.V.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

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INTRODUCTION

Respondents' Brief in Opposition to the Petition for Writ of Certiorari demonstrates that the Petition should be granted.

Respondents' position that no demonstrated sales in the chosen forum does not negate jurisdiction is contrary to law and reason.

Rule 4(k)(2) of the Federal Rules of Civil Procedure is inapplicable to the present case, where Respondents had and pursued opportunities to prosecute actual infringers.

ARGUMENT

The present brief is filed in reply to those new points of argument raised in Respondents' Brief filed on December 16, 2004.

1. Respondents' position that no demonstrated sales in the chosen forum are needed for jurisdiction is contrary to law and reason.

Contrary to Respondents' suggestions, Petitioner has not sold any monitor in the U.S. Jean is a Taiwanese computer monitor manufacturer with its main office in Taipei, Taiwan. A163; A706. All of its business offices, factories, and employees are in Taiwan and China. A706. Jean manufactures computer monitors on behalf of branded monitor vendors, such as ViewSonic, eMachines and IBM. A756; A834; A837; A899. These monitors are labeled with the vendors' own logos and trademarks. A891; A900. Jean's customers, who control their own distribution

channels, do not reveal to the retail end-users what supplier made monitors for them.

The holding below is a marked departure from the previous decisions of this Court. For example, in *Asahi*, there was a finding that 20 percent of the sales of the product in question take place in California. (*Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102 (1987)). There, Justice O'Connor noted that an informal examination of tire tubes had been conducted, and the product in question was, in fact, incorporated into the tires on sale in the jurisdiction in which the action was brought.

In decisions interpreting *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286 (1980), some courts have asserted jurisdiction based on one indirect forum sale as in *Bean Dredging Corp. v. Dredge Technology Corp.*, 744 F. 2d 1081, 1085 (5th Cir. 1984). However, in the instant case, contrary to the Respondents' allegations, there is no evidence of a single sale in the forum in which the action was brought.

It is respectfully submitted that such an extension of jurisdiction is unreasonable under the due process clause of the fourteenth amendment. Particularly in view of the differing interpretations of this Court's decision on *Asahi*, clarification is in order and the present Petition should be granted.

2. Rule 4(k)(2) does not provide Respondents with a cure for deficient jurisdictional evidence.

Respondents alleged, in its Brief in Opposition, that Rule 4(k)(2) was intended to address the kind of situation which this case presents. It is submitted that Respondents' actions and litigation history are inconsistent with its

claiming the benefit of this Rule. The present case is not one in which a potential litigant is barred from access to the courts by a technicality. Respondents have many options in pursuing redress on the basis of a product made by Petitioner, which has found its way into the United States, including actions against computer manufacturers and vendors in this country. In fact, Respondents allege, in their Brief in Opposition to the present Motion, that it has licensed 35 companies under the Patents in Suit with total licenses, settlements, and judgments exceeding $100 million. (Respondents' Brief in Opposition page 2) Respondents are fully capable of pursuing its claims for patent infringement against a variety of defendants, and should not seek to use Rule 4(k)(2) to avoid its evidentiary obligations.

CONCLUSION

It is respectfully submitted that it is time for clarification of *Asahi*, including the question of whether jurisdiction is appropriate in a situation like the present case for patent infringement, in which there is no evidence of a sale of an infringing article in Delaware, much less by the Petitioner. Granting of the Petition for a Writ of Certiorari is in order. Such action is earnestly solicited.

Respectfully submitted,

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